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85-1341

Supreme Court, U.S.
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No. 85-

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

PERRY JOHNSON, Director
Michigan Department of Corrections,
and GLORIA RICHARDSON, Superintendent,
Huron Valley Women's Facility,

Petitioners,

v

GEORGIA D. MANZIE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

DID THE COURT OF APPEALS MISAPPLY HENSLEY v ECKERHART, WHEN IT CONCLUDED THAT RESPONDENT WAS A PREVAILING PARTY ENTITLED TO ATTORNEYS FEES UNDER 42 USC 1983?

II.

IF RESPONDENT WAS A PREVAILING PARTY, WAS THE DISTRICT COURT'S AWARD OF ATTORNEY'S FEES GROSSLY DISPROPORTIONATE TO THE RELIEF OBTAINED?

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v

GEORGIA D. MANZIE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On September 21, 1977, Plaintiff-Respondent Georgia Manzie (hereinafter "Respondent"), a former female prisoner of the Michigan Department of Corrections, commenced a *pro se* action pursuant to 42 USC §1983, seeking declaratory relief and monetary damages for an alleged violation by Defendants-Petitioners (hereinafter "Petitioners") of Respondent's First Amendment right of access to the courts. Respondent's contention was that Petitioners had failed to provide a constitutionally adequate law library during her incarceration.

Respondent's action was subsequently consolidated with a pending class action which also sought declaratory relief for alleged library deficiencies. See *Glover* v *Johnson*, 478 F Supp 1075, 1094 (ED Mich, 1979).

The District Court issued its opinion in *Glover*, *supra*, on October 25, 1979, concluding that Petitioners had violated Respondent's constitutional rights with respect to access to the courts. 478 F Supp at 1097[1] A separate hearing was ordered by the District Court to give Respondent an opportunity to prove damages. 478 F Supp at 1098.

Respondent retained counsel for this hearing, which was conducted on June 5 and 7, 1981, where compensatory and punitive damages were sought. After taking the matter under advisement, the District Court issued its opinion on December 16, 1981, awarding Respondent nominal damages in the amount of $1.00. See Appendix pages 5a-25a. Respondent filed an appeal from this determination. No cross appeal was taken by Petitioners.

In an unpublished December 22, 1983 opinion, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's ruling in *Manzie* v *Johnson*, Docket No. 82-1064. See Appendix pages 30a-35a. Respondent's retained counsel thereafter petitioned the District Court for an award of attorney fees pursuant to 42 USC §1988. The court concluded that Respondent was the prevailing party and in a July 10, 1984 order, awarded attorney's fees in the amount of $2,500.00 See Appendix page 37a. Petitioners filed their notice of appeal to the United States Court of Appeals for the Sixth Circuit on August 7, 1984. The Court of Appeals affirmed the District Court's order in its September 11, 1985 *per curiam* opinion. See Appendix page 39a.

[1]

The District Court in *Glover* appointed counsel to assist Respondent in the preparation of a post-trial brief. See 478 F Supp at 1094. Following the issuance of the opinion in *Glover*, *supra*, the District Court issued its opinion on the motion for attorney fees on behalf of the attorney thus appointed, finding an award of $3,482.73 to be appropriate. See Appendix page 28a. No appeal was taken from this ruling.

JURISDICTION

Petitioners seek review of the Court of Appeals opinion invoking this Court's jurisdiction under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES ADMINISTRATIVE RULES, POLICY DIRECTIVES, AND COURT RULES INVOLVED

42 USC 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 USC 1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the

common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same in not inconsistent wit the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In an action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

U.S. Const. Amend. I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

In her original complaint Respondent alleged she had been deprived of her First Amendment right of access to courts by the Petitioners' failure to furnish an adequate law library during the period of her incarceration by the Michigan Department of Corrections. While so incarcerated, Respondent was housed at the Detroit House of Corrections until the new Huron Valley Women's Facility opened in August of 1977.

Respondent's action was consolidated for trial with a pending class action which the District Court concluded

raised "similar claims." *Glover* v *Johnson*, 478 F Supp 1075 at 1094 (ED MI, 1979). Following trial in *Glover*, the issue of liability was determined adverse to Petitioners on October 17, 1979, 478 F Supp at 1097.

Counsel who assisted Respondent at the *Glover* trial thereafter petitioned for and was awarded attorney's fees in the amount of $3,482.75. See Appendix page 28a.

Respondent retained another attorney to represent her at the June 1981 proceeding, the purpose of which was to ascertain what, if any, damages Respondent could establish. See 478 F Supp at 1097-1098. The nature and scope of this proceeding was explicitly described by the District Court at the onset:

> "THE COURT: Let me make a statement with regard to this matter because I am afraid that it is being volumed out of proportion and I think it requires some rather sturdy admonitions on my part to put this matter back into focus.
>
> "We are here today for the sole purpose of permitting Plaintiffs Cornish and Manzie to submit proofs as to damages sustained by them as has been outlined in several documents that have been heretofore entered in this case.
>
> "Now, let me say at the outset, Mr. Soble, and I say this only in explanation since you have not been present, but this case has been tried. I am not interested in reopening or granting amendments to pleadings or doing anything that will resist what was a very hard fought and lengthy trial in a case that has probably taken up more judicial hours on my docket than any other case, with the possible exception of the Detroit

> Waste Water system case. I don't say that in any pejorative sense, but I think that ought to be known."
>
> Tr. 5, 6, found at Appendix page 1a.

The court also made it clear that liability was not at issue:

> "You have a right, liability being found, you have a right to proceed to prove your damages.
>
> Tr. 8, found at Appendix 3a.
>
> * * *
>
> "THE COURT: I am asking you (counsel for Plaintiff) to proceed as if you won your whole case, and you have.
>
> "At this point in time, all I am interested in is an award of damages."
>
> Tr. 13, found at Appendix 4a.

Counsel's opening statement acknowledged the posture of the case:

> "As this Court knows, I filed my appearance after the liability aspect of the case had been determined by this Court. At that time the Court assured that at least the Huron Valley Women's Facility, that the constitutional rights of women would be protected in the future, but left open specifically the extent to which those constitutional deprivations affected two individual inmates that had been incarcerated first at DEHOCO and then Huron Valley."
>
> Tr. 9.

In a December 16, 1981 opinion, the District Court found Respondent was entitled to nominal damages of $1.00. Notwithstanding this finding, the District Court awarded §1988 attorney's fees to Respondent's retained counsel in the amount of $2,500. On appeal this award was affirmed, the Court of Appeals concluding that Respondent was a "prevailing party" and that the amount of the award was appropriate. See Appendix 44a.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS MISAPPLIED HENSLEY v ECKERHART, WHEN IT CONCLUDED THAT RESPONDENT WAS A PREVAILING PARTY ENTITLED TO ATTORNEYS FEES UNDER 42 USC 1983.

In *Hensley* v *Eckerhart*, 461 US 424; 103 S Ct 1933 (1983), the Court cited *Nadeau* v *Helgemoe*, 581 F2d 275, 278-279 (CA 1, 1978), for the formulation of the test:

> "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation *which achieves some of the benefits the parties sought in bringing the suit.*" (Emphasis added).

In a post-*Hensley* decision, the Sixth Circuit itself has adopted an even more restrictive test for "prevailing party" which requires that the plaintiff prevail on "the central issue." *Kentucky Association for Retarded Citizens, Inc.* v *Peter Conn*, 718 F2d 182, 186.

In the context of the present case, the Court of Appeals found Respondent was successful but failed to properly consider what benefits were obtained. The work benefit is synonymous with profit, utility, boon, service, and favor. Here the District Court's finding did not, indeed, could not, serve as a catalyst for change to benefit Respondent, much less others similarly situated. No injunctive relief has been sought by Respondent. Instead, her claim related solely to historical factual circumstances which the District Court had previously found to no longer exist.

Furthermore, Petitioners tacitly acknowledged Respondent's entitlement to nominal damages at page 6 of their Brief in Support of Answer in Opposition to Motion for Leave to File an Amended Complaint, dated June 5, 1981:

> "Plaintiffs properly recognize the doctrine set forth in *Carey* v *Piphus*, 98 S Ct 1042 (1978) and its progeny requiring proof of actual injury prior to the receipt of anything other than nominal damages. Further, in recognition that no evidence of actual damages can be shown in the case at bar, Plaintiff goes to great lengths in an attempt to distinguish *Carey*, *supra*. The cases Plaintiffs cite supporting this alleged distinction, however, were all actions involving purposeful, active, or intentional infringement on Constitutional rights. Defendants' testimony will show that in the case at bar any deprivation which might have occurred was unintentional and that Defendants acted reasonably in an attempt to protect Plaintiffs' Constitutional rights. Hence, any distinction from the *Carey* proof of actual damages doctrine is illusory and since Plaintiffs cannot so prove, *nominal damages are appropriate in the case at bar.*"

The District Court's perception of the sole purpose of the June 1981 hearing is consistent with Petitioners' position:

> "THE COURT: Let me make a statement with regard to this matter because I am afraid that it is being volumed out of proportion and I think it requires some rather sturdy admonitions on my part to put this matter back into focus.
>
> "We are here today for the sole purpose of permitting Plaintiffs Cornish and Manzie to submit proofs as to damages sustained by them as has been outlined in several documents that have been heretofore entered in this case.
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> "Now, let me say at the outset, Mr. Soble, and I say this only in explanation since you have not been present, but this case has been tried. I am not interested in reopening or granting amendments to pleadings or doing anything that will resist what was a very hard fought and lengthy trial in a case that has probably taken up more judicial hours on my docket than any other case, with the possible exception of the Detroit Waste Water system case. I don't say that in any pejorative sense, but I think that ought to be known."
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"THE COURT: I am asking you (counsel for Plaintiff) to proceed as if you won your whole case, and you have.

"At this point in time, all I am interested in is an award of damages."

Tr. 13, found at Appendix page 4a.

Counsel's opening statement acknowledged the posture of the case:

"As this Court knows, I filed my appearance after the liability aspect of the case had been determined by this Court. At that time the Court assured that at least the Huron Valley Women's Facility, that the constitutional rights of women would be protected in the future, by left open specifically the extent to which those constitutional deprivations affected two individual inmates that had been incarcerated first at DEHOCO and then Huron Valley."

Tr. 19.

Respondent thereupon proceeded unsuccessfully with her claim for actual damages.

The analysis of *Bonnes* v *Long*, 599 F2d 1316, 1319 (CA 5, 1979), is applicable:

"If, as in this case, there is initially a genuine dispute as to whether the plaintiff fee claimant is a 'prevailing party,' inquiry on that question might well proceed first. This inquiry is properly a pragmatic one of both fact and law that will ordinarily range outside the merits of the basic controversy. Its initial focus might well be on establishing the precise factual/legal con-

> dition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, *and which does involve an actual conferral of benefit or relief from the burden when measured against the benchmark condition.*" (Emphasis added).

A refusal to confer "prevailing party" status upon a plaintiff seeking only a monetary award who receives only nominal damages will not undermine the laudatory purpose of §1988. As was recently stated in *Cooper* v *Singer*, 719 F2d 1496, 1502 (CA 10, 1983) (*en banc*):

> "Beyond providing a reasonable evaluation of a lawyer's services, the approach set forth in *Hensley* [v. *Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)] advances the general intendment of section 1988, providing incentives for *meritorious* civil rights litigation. It instructs a lawyer to critically evaluate the prospects for success in each potential civil rights claim, and it encourages the lawyer to proceed only with those claims that are indeed meritorious. The lawyer can go forward with difficult arguments, confident that the client's fee award will reflect the obstacles that the attorney overcomes. The lawyer can go forward with non-monetary claims, secure in the knowledge that the fee award will not be diminished on account of the absence of damages"
>
> 766 F2d 1466.

Such a refusal would also greatly enhance the incentive for meaningful settlement efforts in otherwise weak dam-

age claims. Here the Petitioners' acknowledgement of Respondent's entitlement to nominal damages was totally ignored with the result that the only additional victory obtained inured solely to Respondent's counsel. Such was not the intent of Congress when it enacted §1988:

> "The purpose of the Civil Rights Act as a whole is to protect those who have suffered a constitutional tort. It naturally follows that if an early settlement is possible, the plaintiff, the protected party under the Act, should be compensated swiftly. However, a plaintiff's attorney, who during the early phase of the litigation has spent relatively few hours in preparation, may lack incentive to settle until compensable hours have reached a significant level. Thus, the overriding goal of the Civil Rights Act is thwarted and litigation is encouraged. The already crowded courts are further congested, so that the taxpayer suffers as well."
>
> Attorney's Fees Under the Civil Rights Act—A Time for Change, *The John Marshall Law Review*, Vol 16:261, 178 (1983).

For the above reasons, Petitioners request that this court grant certiorari to define more precisely the parameters of when a Plaintiff can be deemed a "prevailing party" entitled to an award of attorney's fees under 42 USC 1988.

ARGUMENT

II.

IF RESPONDENT WAS A PREVAILING PARTY, THE DISTRICT COURT'S AWARD OF ATTORNEY'S FEES WAS GROSSLY DISPROPORTIONATE TO THE RELIEF OBTAINED.

Following the District Court's award of nominal damages, Respondent's counsel was awarded attorney's fees in the amount of $2,500.00. While perhaps not disproportionate to the number of hours actually expended by counsel, such an award is grossly disproportionate to the degree of success achieved by Respondent.

In *Hensley, supra*, the Court singled out as an "important factor" the "results obtained," stating:

> "This factor is *particularly crucial* where a plaintiff is deemed 'prevailing' even though he succeeded on only some of this claims for relief."
>
> 461 US 424, 434.

In the present case Respondent's success was so minimal that even the "reduced" fee award of $2,500.00 is unconscionable. As noted earlier, Petitioners conceeded Respondent's entitlement to nominal damages prior to the hearing. Thus, while it might be argued that the District Court's finding of nominal damages could technically bestow prevailing party status, the success thus achieved is too illusory to support even the reduced fee award of $2,500. Such an award quite simply bears no reasonable relationship to the *de minimus* results and clearly evidences a failure by the District Court to "consider the amount of monetary damages recovered in the underlying

action." See August 28, 1985 In Chambers Opinion by Justice Rehnquist in *City of Riverside* v *Rivera*, on application for stay. In the present case, just as in *Riverside*,

> ". . . no restraining orders or injuctions were ever issued against any of the Defendants, and [they were] not compelled to, and did not change any of [their] practices or policies as a result of the suit."

With a slight distinction, the present case supports a further analogy to *McKeesport* v *Cunningham*, No. 84-1793 which, Justice Rehnquist observed, "created no new law and was unlikely to benefit anyone but the plaintiff." The distinction between *McKeesport* and the present case being that not even the plaintiff benefited. Under all these circumstances, Petitioners contend the fee award of $2,500.00 ". . . is disproportionately large in comparison to the amount of the monetary judgment recovered." *McKeesport, supra*. This Court should grant certiorari to clarify the authority of the Federal Courts to grant attorney's fees pursuant to 42 USC §1988 where the plaintiff, while technically a "prevailing party," received no benefit for herself or others.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

[5] Court for the Eastern District of Michigan, and would request the Court grant the motion for his admission.

THE COURT: Well, I am happy, Mr. Roberts, to grant your motion and to admit Mr. Eggan to practice before the bar of this court.

It will be necessary for you to take the prescribed oath. Will you raise your right hand.

(Eric J. Eggan, admitted to practice in the Eastern District of Michigan.)

THE COURT: Let me make a statement with regard to this matter because I am afraid that it is being volumed out of proportion and I think it requires some rather sturdy admonitions on my part to put this matter back into focus.

We are here today for the sole purpose of permitting Plaintiffs Cornish and Manzie to submit proofs as to damages sustained by them as has been outlined in several documents that have been heretofore entered in this case.

Now, let me say at the outset, Mr. Soble, and I say this only in explanation since you have not been present, but his case has been tried. I am not interested in reopening or granting amendments to pleadings or doing anything that will resist what was a very hard fought and lengthy trial in a case that has probably taken up more [6] judicial hours on my docket than any other case, with the possible exception of the Detroit Waste Water system case. I don't say that in any pejorative sense, but I think that ought to be known.

Now, in the opinion that I issued in this case on October 2, 1979, I said, at page 45:

"Having determined liability of the Defendants to Plaintiffs in this matter, I must resolve the issue of damages. At an earlier point in these proceedings, I limited Plaintiff's proofs to matters going directly to the issue of liability on the ground that damages would become relevant only if a finding of liability was made."

"Plaintiffs, therefore, must now be given an opportunity to prove such damages, if any, as were caused by the state's denial of their constitutional rights, and a hearing for that purpose will be held at a date to be set by the Court."

Now, that particular paragraph went beyond the opportunity that was intended to be afforded to Plaintiffs Cornish and Manzie. It went to the rights of the Plaintiffs themselves. But to illustrate that I had in mind the damage action also as it related to Plaintiffs Cornish and Manzie, the footnote on page 45 is illustrative. Now, I pick that matter up in the interim order that was

* * *

[8] So, that's all that I am going to do. I am not going to entertain any amendments, motions to amend; I am not going to reopen the trial; I am not going to go into new issues. This case has had its full and fair day in Court. I am only interested in knowing if there are any damages and what they are, and give Plaintiffs an opportunity to present that.

MR. SOBLE: May I be heard on that issue, your Honor?

THE COURT: Yes, but that's my ruling. However, you can make a statement for the record.

MR. SOBLE: The amendment that was filed by both Plaintiffs raised, in Plaintiff's view, new issues that had not already been brought to your attention in the prior hearing.

THE COURT: I am only interested in your brief on damages. We are not going to go into any other proofs.

MR. SOBLE: We ask not that the Court open any of the prior proceedings. As a matter of fact, some pain was taken in the amendments to key it to the opinion and the facts that were already determined.

THE COURT: You don't need any amendment for that purpose. You have a right, liability being found, you have a right to proceed to prove your damages. I don't [9] need to amend any papers to give you that.

MR. SOBLE: Given that as the ruling, then, we have one additional problem, having been served last night with an answer—

THE COURT: No. This is the date. The parties have known for years, not months, not weeks, not days, but for years that a time that would come in which proofs would have to be presented as to damages.

Now, the defendants answer does not modify anything.

MR. SOBLE: It does, 100 percent.

THE COURT: Not in my mind, and that's the important thing—

MR. SOBLE: We are prepared to proceed with damages this morning. However, I urge the Court to note that for the first time last night at 5:00, the defendants indicated they had affirmative defenses in this case.

THE COURT: I am not going to hear those.

MR. SOBLE: Fine. If that's the ruling, we are prepared to proceed.

THE COURT: I am simply going to find damages.

MR. SOBLE: Fine.

May we make a brief opening statement?

THE COURT: Do you wish to be heard, by

* * *

[13] Court. They are raising the defense of good faith.

THE COURT: I am not saying I am going with you on that.

MR. SOBLE: You are asking me to proceed absent any ruling from this Court?

THE COURT: I am asking you to proceed as if you won your whole case, and you have.

At this point in time, all I am interested in is an award of damages. Now, if, as a matter of law, in the nature of some kind of appellate review or revisitation of the scene, there is some command that I have to abide by that says that damages cannot be awarded even though I found liability and even though I found damages, I will hear you on that.

Certainly, if Mr. Roberts is correct in that, I don't need a Court of Appeals to tell me that.

MR. SOBLE: All I am pressing in this Court is the prejudice we had in getting the answer last night.

THE COURT: But I am not going to allow you to be prejudiced because it does not affect your proofs on damages.

MR. SOBLE: It does.

THE COURT: How?

MR. SOBLE: How? A, good faith defense

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARMAINE L. CORNISH and GEORGIA D. MANZIE, Plaintiffs, v. PERRY JOHNSON, Director, Michigan Department of Corrections and GLORIA RICHARDSON, Superintendent, Huron Valley Women's Facility, individually and in their official capacities, jointly and severally, Defendants.	Civil Action No. 77-72557

OPINION ON DAMAGES

This case was consolidated with *Glover* v *Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979), on March 17, 1978, a civil

rights action that challenged the treatment and rehabilitation programs provided to female prisoners who were then incarcerated at the Detroit House of Corrections ("DeHoCo"), because both cases raised the issue of the adequacy of the law library furnished to women at DeHoCo and at Huron Valley Women's Facility ("Huron Valley"). A hearing was held on June 5, 1981, to determine the library resources available to the individual plaintiffs during their incarceration and to assess their damages, if any, from the alleged inadequacies.

Prior to December of 1975, women felons in Michigan were incarcerated at DeHoCo through a contract between the Michigan Department of Corrections ("Department") and the City of Detroit. After that date, the Department assumed full responsibility for the administration of DeHoCo while Huron Valley was being constructed. The women were moved to Huron Valley approximately on August 5, 1977. With additional space at the Kalamazoo County Jail to relieve overcrowding at the Huron Valley Facility and the correctional camp program, this constituted the correctional programs provided by Michigan for women prisoners.

I determined in *Glover* that although the library at Huron Valley presently meets the standards articulated in *Bounds* v *Smith*, 430 U.S. 817 (1977), there was evidence that indicated that the law library at the Detroit House of Corrections did not meet the State's minimum standards at any time prior to the move to Huron Valley. *Glover, supra*, at 1094. Plaintiffs state in their complaint that the library lacked federal reporters, federal and state digests, a federal treatise, and legal forms. They also claim that they were unable to have access to the library during the time that the move to Huron Valley was being effectuated. Manzie contends that because of the inadequacy of the library, she was unable to discover the inequities between the women's

rehabilitational facilities and programs, particularly the program that provides for incentive good time, and thus served ninety days more than necessary. She claims damages for the loss of her liberty during this time and, since she had a job upon her release, her lost wages. Both plaintiffs claim damages for the pain and suffering that they endured as a result of inadequate facilities.

I.

According to James Neuhard, of the Michigan State Appellate Defender's Office, the Detroit House of Corrections did not have a law library prior to the time that the State took over operation of the facility in 1975. Sometime thereafter a room was designated as the "law library" but there is no evidence as to the contents of the so-called library. This does not, however, mean that the Department was unaware of the necessity of a law library to meet the minimum standards providing protection of the prisoners' First Amendment right to access to the courts. In 1972, the Michigan State Law Library began developing a checklist for state prisons, and as early as 1973, Perry Johnson, defendant in this suit, devised a list that set forth those research tools considered to be minimally required under *Gilmore* v *Lynch*, 319 F.Supp. 105 (N.D. Cal. 1970), *aff'd sub nom. Younger* v *Gilmore*, 404 U.S. 15 (1971), and *Sullivan* v *Brown*, C.A. No. M-9-72 (W.D. Mich. 1973). A departmental policy was developed in 1974 that stated that prisioners who had need of a law library should be transferred to a facility that had a library if they were incarcerated in a prison that had inadequate facilities. The policy, although perhaps well-intentioned, had no beneficial effect on the women prisoners since DeHoCo was the sole place that women were imprisoned.

In 1976, some changes began to take effect. Johnson was notified by the prisoners at DeHoCo, particularly in a petition signed by thirty residents, including Charmaine Cornish, that the law library was inadequate. Charles Wolff, the assistant state law librarian, visited DeHoCo during that year and observed several unopened cartons containing the Federal Supplement and Federal Reporter, Second Series, first ordered in January of 1976. Wolff states that he discussed returning these sets to the publisher for volumes that would be more useful to the women. This suggestion apparently was not followed, for Manzie testified that in August, 1976, a federal library was available, consisting of the Federal Supplement and Federal Reporter, Second Series, but the volumes of Michigan Compiled Laws were lacking pocket parts and no digests were available as research aids. Wolff testified that in 1976, in his position as assistant state law librarian, he developed a revised recommended minimal list of books for Michigan state prisons. Additionally, in 1975 or 1976, DeHoCo received books that were "self-taught" programs in legal research. This was in lieu of a paralegal program or more traditional legal research courses.

Prior to the move to Huron Valley, the state reporters, Michigan Reports and Michigan Appellate Reports arrived at DeHoCo, apparently after having been erroneously sent to the State Prison of Southern Michigan in Jackson. Fearful of the loss of the volumes prior to the move, Johnson had them remain in the shipping cartons. The remaining books were packed in anticipation of the transfer on or about July 20, 1977. Although the prisoners and all the accompanying paraphernalia were moved on August 5, the law books were not unpacked until September 29. Varying reasons were given for the delay, including the fact that a "law librarian" would be hired and aid in the organization of the library and that clothing, considered to be contraband, was found to be in the boxes thought to contain

books. In either event, over two months passed before the books were unpacked.

Manzie testified that she submitted her first petition to the Saginaw County Circuit Court on March 11, 1976, which was returned to her in part because it did not comply with the Michigan General Court Rules. Manzie states that she was unable to read the necessary rules or the cases cited to her by the court because the books were not available to her. Cornish and Manzie contend that they suffered damage for the time during which they were denied access to the law library while it was being moved from DeHoCo to Huron Valley. Manzie's clinical psychologist, Michael Abramski, states that Manzie suffered severe psychological depression resulting, in part, from her frustrated attempts to seek access to the judicial system through the law library. He anticipates that she will need approximately three more years of intensive psychotherapy to enable her to fully regain her mental health. The State contends that her pre-sentence report discloses a long history of neuroses, stemming from childhood, and that the denial of an adequate prison library bears little or no relation to her claimed mental illness.

According to Manzie, she was also denied her freedom through the non-accumulation of incentive good time and, that had she had access to the policy directives of the Department, she would have been able to meet the criteria for placement in a women's camp program, thus obtaining her release approximately three months earlier. Manzie maintains that she met the minimum security criteria on August 9, 1977, but was unaware of the actual procedure and requirements until March of 1978, when the policy directives were added to the library. The State seeks to rebut this contention that she met the minimum security criteria by arguing that Manzie had chronic active hepatitis that did not require treatment and that she was on constant

medication for acne control. Her only medical restriction was a curtailment of kitchen duty, which would not preclude her participation in a camp program.

Cornish concedes that she does not suffer such severe pain and suffering so as to require psychiatric therapy. However, she claims she was forced to seek access to the judicial system through jailhouse lawyers and "writ writers" at the men's prison in Jackson. In return for their assistance, she was coerced into providing the names and numbers of female prisoners to whom the men in Jackson could write and was asked to make a "personal commitment" to the man who was helping her through the Jackson library. When Cornish attempted to communicate with another male prisoner at Jackson, her jailhouse lawyer threatened to discontinue his assistance, leaving Cornish with no recourse to the courts.

Manzie was imprisoned from February 2, 1976 through February 9, 1979. Charmaine Cornish was incarcerated in September of 1973 and continues to serve her mandatory life sentence.

II.

I find that the law library was inadequate as it existed at DeHoCo through the period of the move to Huron Valley. The testimony at the hearing clearly demonstrates that Johnson knew of the need to provide adequate law library facilities to prisoners. No shortage of information provides an excuse for non-compliance, since the American Correctional Association, of which Johnson had been a member for fifteen to twenty years, promulgated a checklist of books for prison libraries in 1973. In the latter part of 1972, similar checklists were published in the organization journal for the American Association of Law Libraries and by

West Publishing Company. Additionally, in the policy directive issued by Johnson on March 1, 1974 (No. 61.01), Johnson cites to the *Gilmore* case as a source for suggested inventories of materials. In any event, the evidence is clear that prior to the State's assumption of administrative duties in 1975, the law library was non-functional at DeHoCo and, for all practical purposes, non-existent.

I also find that the law library provided to women prisoners between December, 1975 and September 29, 1977 was not in conformity with the constitutional standards articulated beginning with *Gilmore*. Although it is true that a standard list of publications was not approved by a court until the *Bounds* decision in 1977, the complete absence of *any* library is not excused by the lack of judicial approval of a book list. This is particularly intolerable in light of the admission that law libraries were provided to male prisoners (albeit the policy directive specifies "at major institutions") and in view of the checklist generated internally by the Department in 1973. Although it appears that the Department ordered books for DeHoCo, which were erroneously sent to Jackson before they arrived at DeHoCo, it is obvious that a set of the Federal Supplement and the Federal Reporter, Second Series, does not constitute an adequate library for a state prison. *See*, particularly, *Gilmore, supra*, at 110-11, observing that the United States Code and the Federal Rules of Civil Procedure are useful because the majority of habeas corpus petitions that are filed are in federal district court and that unannotated versions of the state codes and reporters are of limited use since access to pertinent cases is not readily available.

The fact that the Department contracted with Detroit to house women prisoners does not relieve it from liability for the failure to provide the women a law library at this time.

> No matter where Corrections may choose lawfully or need lawfully to incarcerate or permit incarceration of any such prisoner, its duty to him remains constant and may not be subjected to delegation; whether or not others are concurrently accountable for breach of the same or a corresponding legal duty.

Green v. Department of Corrections, 386 Mich. 459, 465, 192 N.W.2d 491 (1971); M.C.L.A. §791.204. Furthermore, any protection that the women may have received by keeping the collections intact in boxes prior to the move to Huron Valley is more than offset by the detriment to the women by denying them access to the books for as long as a year.

III.

The State claims three affirmative defenses to plaintiffs' charges: Eleventh Amendment immunity, executive immunity, and qualified immunity. These claims are addressed *seriatim*.

Eleventh Amendment Immunity

The Eleventh Amendment is interpreted as a bar to suits against states by citizens of another state unless the state has given its consent. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte New York*, 256 U.S. 490 (1921). This Amendment has also been interpreted to bar suits against a state by its own citizens in federal court as well. *See, e.c., Employees v. Department of Public Health and Welfare*, 411 U.S. 279 (1973); *Hans v. Louisiana*, 134 U.S. 1 (1890). The necessary corrollary to the rule is that state officials, acting in their official capacity, are immune from suit, but when state officials act outside the scope of their authority so as to abuse their power, the officials are no longer protected from liability for their actions. *Ex parte Young*, 209 U.S. 123 (1908).

It is the State's position that there is no evidence that its officials, namely Johnson and Richardson, grossly abused the lawful powers of their office and cite *Kurz v. Michigan*, 548 F.2d 172 (6th Cir.), *cert. denied*, 434 U.S. 972 (1977), in support of their contention. *Kurz* was an action against the state for damages stemming from wrongful prosecution of an attorney for contempt of court. With regard to the attorney's cause of action pursuant to 42 U.S.C. §1983, the court concluded:

> The State of Michigan is plainly immune from this suit for damages under the Eleventh Amendment and the holding of *Edelman v. Jordan* [supra]. The county of Monroe is not a "person" under 42 U.S.C. §1983 (1970). *See City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed2d 109 (1973).[1] The action as to both governmental units plainly should have been dismissed.

548 F.2d at 174. The court went on to hold that the alleged wrongful acts of the Solicitor General of Michigan, in pursuing the contempt charges, did not comprise an abuse of his lawful powers of office and that any judgment against him would effectively be a judgment against the state, thus barred by *Edelman*.

In this case, plaintiffs seek damages from defendants acting not only in their official capacity, but also in their individual capacity. In a decision involving suits brought by the personal representatives of the estates of students who died during the Kent State University alleged civil

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[1]

Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), overruled *Kenosha* to the extent that it held that local municipalities were immune from suit, under §1983, particularly in regard to injunctive relief.

disorder, the United States Supreme Court reaffirmed its holding in *Ex parte Young, supra.*

> *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he
>
> > "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*, at 159-60. (emphasis supplied).
>
> . . . While it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury [citations omitted], damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office.

Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974). Thus defendants are not immune from suit because of an Eleventh Amendment bar.

Executive Immunity

Defendants argue that because their activities were executed in furtherance of the public good and within the scope of their duties, they are subject to executive immunity. The concept of executive immunity is founded upon the policy consideration that "it is not a tort for government to govern." *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting). Executive immunity is not applicable, however, as an absolute privilege to suits brought against public officials pursuant to 42 U.S.C.

§ 1983. Indeed, just the opposite is intended since that section has been held to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172 (1961). The court, in *Monroe*, held that the intent of the statute was to permit enforcement of the provisions of the Fourteenth Amendment against those who operate under the authority of a state, whether or not their actions are consonant with that authority.[12]

In a decision reviewing the concept of executive immunity in relation to civil rights actions, the United States Supreme Court noted that decisions of the executive branch of government are likely to arise in the context where broad decisions of "subtle" effect are routine, and hence, the range of discretion accorded the decisions must be comparably broad. However, the court considered that

> a qualified immunity is availiable to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Scheurer v. Rhodes, *supra*, at 247-48. This standard has been held to apply to prison authorities and prison officials, *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978),

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[12]

Monell, *supra*, also overruled *Monroe v. Pape*, *supra*, insofar as it holds that local governments are wholly immune from suit under § 1983.

although the degree of immunity is limited if the official knew or should have known that his actions would violate the constitutional rights of the individual or if the action was malicious in intent. *Id.*, at 562, citing *Wood v. Strickland*, 420 U.S. 308, 322 (1975). In this case, therefore, there is no absolute immunity by virtue of the fact that defendants were employees of the executive branch of state government.

Qualified Immunity

The cases previously cited indicate that where an official acted in good faith in the execution of his responsibilities as a state officer, he or she will be shielded from liability for violations of an individual's constitutional rights. He will not, however, be shielded if he acts with such disregard of an individual's rights that his action cannot reasonably be characterized as being in good faith. *Wood, supra*, at 322. Under this test, if the right allegedly infringed by defendants was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm, the good faith immunity defense would not be applicable. *Procunier, supra*, at 562.

I find that the conduct of defendants in this case cannot withstand the test for good faith immunity. Johnson testified that he knew in 1973 that the First Amendment right of access of the courts included access to a law library for indigent prisoners. His knowledge admittedly stemmed from the decision of the district court in California in *Gilmore, supra*, and the similar case in Michigan, *Sullivan, supra*. Yet it is apparent from the actions taken by the Department at his direction that no law library for the women prisoners was even under consideration until the prisoners complained of the lack of legal resources and research tools in 1976. Other policies of the Department

support my conclusion. Law libraries were found to be necessary to the protection of the constitutional rights of the male prisoners, so much so that the prisoners were transferred to other institutions if they were in need of legal research materials. No similar consideration was extended to the women. Furthermore, upon the acquisition of the materials for the women's facility, the books remained crated for "convenience" and the "protection" of the prisoners, an action that was intentional and clearly violative of the women's right to use of a law library. Gloria Richardson, the superintendent of DeHoCo and thereafter Huron Valley, did not know when the books were crated or unpacked, but her assistant, Dorothy Costen, stated that she delayed unpacking the books. No good reasons were provided by the Department officials for the two-month delay. Based on these facts, I must conclude that the conduct of the Department officers, acting in their individual capacity, was undertaken with full knowledge of the right of the women prisoners to access to a law library and in willful violation thereof.

IV.

Having determined that there is liability on the part of defendants for the period between 1973 and the date of establishment of the law library as Huron Valley on September 29, 1977, and finding that there are no applicable defenses to the actions of defendants, I must now determine the issue of damages.

Compensatory damages are awardable for the deprivation of constitutional rights pursuant to a §1983 action. *Carey v. Piphus*, 435 U.S. 247, 262-63 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 422 (1976) (White, J., concurring). In certain instances, exemplary or punitive damages may be awarded specifically to deter or punish violations of

constitutional rights. *See, e.g., Stengel v. Belchner*, 522 F.2d 438, 444 n.4 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976). However, there is no right to damages *per se*, at least in the case of procedural due process. *Carey, supra*, at 262-63; *Morrow v. Igleburger*, 584 F.2d 767, 769 (6th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979).

In a letter to the Department of Corrections dated December 10, 1980, Manzie claims damages in the amount of $2,240 for lost wages during the period that she was allegedly denied incentive good time and $36,000 as damages for loss of her liberty during that time. She cites *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979), a case in which a prisoner was transferred to prison from a prison farm. The court in *Buise* held that a compensatory dollar amount, although difficult to establish, did not preclude an award of more than nominal damages. In that case, however, the prisoner's transfer was found to be a retaliatory action for his activities as a jailhouse lawyer and his attempts to have a law library established at the farm.

The principal thrust of Manzie's claim is that had she had access to the policy directives in the law library, she would have been released to a camp program and accumulated ninety days of incentive good time. Manzie contends that she would have been eligible for placement in a camp program in August of 1977. Even after the directives were provided to the law library in March, 1978, Manzie contends that the lack of an adequate law library precluded her from challenging the discriminatory actions of defendants at an earlier date.

Plaintiff Manzie's claim has two flaws. First, she was not denied participation in the camp program as a retaliatory action, unlike the plaintiff in *Buise*. No camp program existed for women until after I entered my interim order of

March 7, 1980, consonant with my findings in the Opinion of October 17, 1979, almost eight months after Manzie was released. Second, I am in agreement with my colleague, Judge James P. Churchill, who reviewed the issue of Manzie's qualification for a camp program in a petition for habeas corpus and am bound by his decision, at least as it applies to the accumulation of good time. See, *Wolff v. McDonnell*, 418 U.S. 539, 554 & n.12 (1974). In his Opinion, he stated:

> Petitioner's claim is based on her assertion that she was denied a transfer to the camp program solely because she is female. However, this allegation is not supported by the record. In response to the Client Grievance Form she submitted to the Respondent on January 6, 1978, the Director of the Department of Corrections informed Petitioner that she would not qualify for a conservation camp because her security classification was for medium custody. Petitioner's classification remained unchanged until February 5, 1979, when she was reclassified for community status. Thus, it was not until then that she became eligible for transfer to the camp program. At that time Petitioner was placed in a community treatment center, where she was afforded the opportunity to obtain work in the community, to attend college, and to participate in a furlough program. Because Petitioner was transferred to an alternate favorable program at the time she became eligible for the camp program, it cannot be said that she lost good time credit, a benefit of the camp program, because of her gender.

Manzie v. Department of Corrections, No. 80-74208 (E.D. Mich., filed May 4, 1981). Thus, even if camp programs were available to women prisoners, Manzie would not have qualified for them because of her security classification until February 5, 1979, when she was released to a

community treatment center. Although Manzie contends that she qualified for classification as minimum security approximately eighteen months earlier than February, 1979, I cannot substitute my judgment for that of the Department in this instance. Plaintiff's remedy for the alleged misclassification is through the state procedure or a writ of habeas corpus. Additionally, the community treatment program allowed Manzie to obtain work in the community, specifically the job that she had waiting for her for which she claims damages. In the camp program, Manzie would have been working on a project for the Department of Natural Resources, a task totally unrelated to her goals upon release. I find no damages accrued to Manzie as a result of these actions and deny the claims for lost wages and denial of freedom.

Both plaintiffs request damages as compensation for mental distress suffered from the lack of access to a law library. Cornish contends that she was humiliated by having to consistently seek help in her legal claims from the male prisoners incarcerated at the State Prison of Southern Michigan and was harassed by at least one of them into agreeing to provide sexual favors to the prisoner after she was released. Cornish also baldly asserts that she would not have been incarcerated for eight years if there was reasonable access to a law library. The only apparent basis for this assertion is that she may have prevailed on one of her writs of habeas corpus. Manzie, who is presently under psychiatric care, contends that her present psychological problems are due to the lack of access to a law library.

I find that neither of the plaintiffs has sustained her burden of proof to support a claim of damages for pain and suffering. Although Cornish may have been embarrassed to seek aid from the male prisoners, I do not find that she was harmed by so doing during the time that there were

minimal facilities available to the women for legal research.

There is little question that Manzie suffers psychological problems. However, her psychologist was unable to pinpoint the trauma that Manzie suffered directly as a result of the lack of access to the law library. Manzie has a long history of psychological problems and was hospitalized prior to her incarceration for psychiatric treatment. The lack of a law library may have contributed to Manzie's present difficulties but it is certainly not the sole factor. Although Manzie testified that she was frustrated by her inability to challenge the Department's allegedly restrictive and unconstitutional policies, I do not believe that she has demonstrated that she was injured by the denial of access to a law library.

V.

I find that plaintiffs' constitutional right of access to the courts was knowingly and intentionally violated by both of the individual defendants in this case. Having reached this determination, but finding no actual damages to be compensated, I must decide if plaintiffs are entitled to nominal or punitive damages.

In certain instances, a nominal sum of money has been awarded to individuals who have not sustained actual injury for the vindication of their rights and in recognition of the importance to society that the rights be scrupulously observed. *Carey, supra*, at 266.

> Whether or not actual compensatory damage is present, a plaintiff in an action under 42 U.S.C. §1983 may also recover nominal damages because the constitutional rights of a citizen are so valuable to him that an

> injury is presumed to flow from the deprivation itself. In most cases when a public official denied rights that the citizen felt were secure under our Constitution, the result is hurt feelings, outrage, embarrassment or humiliation and nominal damages may be awarded for these natural consequences of lawless action by state officials.

United States ex. rel. Motley v. Rundle, 340 F.Supp. 807, 810-811 (E.D. Pa. 1972). In holding that an award of $500 was too excessive to be considered "nominal", and suggesting, instead, an award of one dollar, nominal damages were defined by a court as "a mere token, signifying that the plaintiff's rights were technically invaded even though he suffered, or could prove, no loss or damage." *Magnett v. Pelletier*, 488 F.2d 33, 35 (1st Cir. 1973), *citing Chesapeake & Potomac Tel. Co. v. Clay*, 194 F.2d 888 (D.C. Cir. 1952).

Punitive damages may also be awarded in appropriate cases to deter the deprivation of constitutionally guaranteed rights. *Carey, supra*, at 257 n.11; *Morrow v. Igleburger, supra* at 769; *Stengel v. Belcher, supra; McDaniel v. Carroll*, 457 F.2d 968 (6th Cir. 1972), *cert. denied*, 409 U.S. 1106 (1973). Although punitive damages are awarded when defendants have not acted in good faith or have willfully disregarded the rights of the plaintiff, the general purpose of punitive damages is to provide a deterrent. *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied sub nom. Sostre v. Oswald*, 404 U.S. 1049, and *cert. denied*, 405 U.S. 978 (1972); *Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965).

The award of punitive damages in this case would serve no purpose as a deterrent. Plaintiffs have achieved the relief that they sought since the Department of Corrections has provided a law library that I have found to be in

compliance with the standards of *Bounds*. The Department is also participating in remedial actions that I ordered to improve the rehabilitative programs for women prisoners so that they are equal to those offered to the male prisoners. The implementation and costs of these programs provide a more constructive and effective deterrent than any damages that I could award to plaintiffs individually. Therefore, I decline to award a sum of money as punitive damages.

Nominal damages are appropriate, however, since plaintiffs were denied their constitutional rights. Plaintiffs suffered humiliation and frustration resulting from the mere denial of rights that they had come to expect, particularly the right of access to the judicial system. In accordance with the examples set forth by the courts in the cases discussed previously, I hereby award each plaintiff the sum of one dollar ($1.00).

An appropriate Order may issue.

John Feikens /s/
John Feikens
Chief United States
District Judge

December 16, 1981

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARMAINE L. CORNISH and GEORGIA D. MANZIE, Plaintiffs, v. PERRY JOHNSON, Director, Michigan Department of Corrections and GLORIA RICHARDSON, Superintendent, Huron Valley Women's Facility, individually and in their official capacities, jointly and severally, Defendants.	Civil Action No. 77-72557

ORDER AWARDING PLAINTIFFS NOMINAL DAMAGES

At a session of said court, held in the Federal Building and United States Courthouse, City of Detroit, County of Wayne, State of Michigan, on the sixteenth day of December, 1981.

Present: John Feikens, Chief United States District Judge

For the reasons set forth in the attached Opinion,

IT IS ORDERED that plaintiffs' prayers for damages in the above-entitled case be, and the same hereby are, GRANTED and for nominal damages only, and the remaining claims for damages are hereby DENIED.

IT IS FURTHER ORDERED that each plaintiff may receive the sum of one dollar ($1.00) as nominal damages.

John Feikens /s/
John Feikens
Chief United States District Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARMAINE L. CORNISH and GEORGIA D. MANZIE, Plaintiffs, v. PERRY JOHNSON, Director, Michigan Department of Corrections and GLORIA RICHARDSON, Superintendent, Huron Valley Women's Facility, individually and in their official capacities, jointly and severally, Defendants.	Civil Action No. 77-72557

OPINION ON MOTION FOR AN AWARD OF ATTORNEY FEES TO CHARLENE SNOW

Charlene Snow, whom I appointed to write the post-trial brief for the plaintiffs in this case who had proceeded *pro se*, has petitioned for an award of attorney fees in the amount of $3,482.75 pursuant to 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act of 1976.

This case was consolidated with *Glover v. Johnson*, 478 F.Supp. 1075 (E.D. Mich. 1979), on March 17, 1978, a civil rights actions that challenged the treatment and rehabilitation programs provided to female prisoners who were

then incarcerated at the Detroit House of Corrections because both cases raised the issue of the adequacy of the law library furnished to women at Detroit House of Corrections and at Huron Valley Women's Facility ("Huron Valley"). I determined in *Glover* that although the library at Huron Valley presently meets the standards articulated in *Bounds v. Smith*, 430 U.S. 817 (1977), there was evidence that the law library at the Detroit House of Corrections did not meet the State's minimum standards at any time prior to the move to Huron Valley. 478 F.Supp. at 1094. A hearing was held on June 5, 1981, to determine the library resources available to the individual plaintiffs during their incarceration and to assess their damages, if any, from the alleged inadequacies. In an opinion issued on December 17, 1981, I found that the law library provided to women prisoners at the Detroit House of Corrections was not in conformity with constitutional standards. I awarded plaintiffs only nominal damages, however, because they were unable to prove compensatory damages or to show that an award of punitive damages would act as a further deterrent to the State.

An award of attorney fees is proper in this case since plaintiffs have prevailed on their claim. *Martin v. Hancock*, 466 F.Supp. 454 (D.Minn. 1979). Fees are subject to the court's discretionary determination of their reasonableness. *Northcross v. Board of Education of the Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

I find that the affidavit submitted by Ms. Snow has demonstrated that she worked 46.45 hours on the post-trial phase of plaintiffs' case. A reasonable fee for an attorney of her skills and expertise in the Detroit metropolitan area is $75.00 an hour. Therefore an award of $3,482.75 is proper in this case.

No objection is made by opposing counsel.

An appropriate order shall issue.

John Feikens /s/
John Feikens
Chief United States District Judge

February 5, 1982

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARMAINE L. CORNISH and GEORGIA D. MANZIE, Plaintiffs, v. PERRY JOHNSON, Director, Michigan Department of Corrections and GLORIA RICHARDSON, Superintendent, Huron Valley Women's Facility, individually and in their official capacities, jointly and severally, Defendants.	Civil Action No. 77-72557

ORDER

This matter having come before the court on plaintiffs' attorney's motion for an award of attorney fees, pursuant to

42 U.S.C. §1988, and the court being fully advised in the premises, and for the reasons set forth in the attached opinion,

IT IS ORDERED that the motion in the above-entitled case is GRANTED, and that attorney fees in the amount of $3,482.75 be awarded to Charlene Snow.

John Feikens /s/
John Feikens
Chief United States
District Judge

February 5, 1982

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FILED
NOV. 1, 1983
JOHN P. HEHMAN, Clerk

(NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARMAINE L. CORNISH, Plaintiff GEORGIA D. MANZIE, Plaintiff-Appellant v. PERRY JOHNSON, Director, Michigan Department of Corrections, and GLORIA RICHARDSON, Superintendent, Huron Valley Women's Facility, individually and in their official capacities, jointly and severally, Defendants-Appellees	No. 82-1064

ORDER

Before: ENGEL and MARTIN, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

After a determination that the Michigan Department of Corrections had failed to provide an adequate law library to various residents of the Michigan Penal System, Georgia D. Manzie appeals the award of only nominal damages.

Manzie, a former female prisoner of the Michigan Department of Corrections, brought this action pursuant to 42

U.S.C. §1983 seeking declaratory relief and damages for the denial of her constitutional right of access to the courts. The thrust of Manzie's claim was that the defendants failed to afford her a constitutionally adequate law library while she was incarcerated at the Detroit House of Corrections. As part of her claim, she asserts that the Department's failure to provide an adequate law library denied her the opportunity to challenge discriminatory policies of the Department and delayed her efforts in securing outside employment upon the termination of her prison sentence. Her case was consolidated with *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979), on March 17, 1978. *Glover* was a class action which also challenged the inadequacy of library facilities provided to female prisoners incarcerated at the Detroit House of Corrections, along with other claims regarding the treatment and rehabilitation programs offered to all female prisoners.

While her 1983 claim was pending, Manzie filed a habeas corpus petition, *in propia persona*, in the Eastern District of Michigan. There she contended that the Department's policy of not allowing female prisoners to participate in work release programs while permitting male prisoners to engage in similar programs, violated the Equal Protection Clause and denied her an opportunity to earn incentive good time, which could have reduced the length of her prison sentence.

In response to this habeas petition, the Department filed a motion to dismiss or in the alternative for summary judgment, asserting that Manzie had failed to exhaust her state remedies and that any injury suffered due to the state's policy had been remedied by the subsequent decision in *Glover v. Johnson, supra*, which found the state's policy to be unconstitutional. In granting the motion neither of these defenses was adopted; instead, the court held that the state's refusal to assign Manzie to a work release was

justified because her security classification prohibited such a transfer. In support of this decision the court relied upon a prisoner grievance form which Manzie had filed in January, 1978 and the Department's response to that grievance. Here, Manzie alleges, and the Department offers no rebuttal, neither the grievance she filed, nor the Department's response to that grievance, were a part of the record before the court. She argues the issue of her security status had not been raised by the Department in their response to her habeas petition.

On December 17, 1981, the court, in its final disposition of Manzie's 1983 claim, determined that the state had knowingly failed to provide a constitutionally adequate law library for Manzie and other female prisoners incarcerated at the Detroit House of Corrections. On the claim for damages, however, only nominal damages were awarded.

Here, Manzie raises three issues:

(1) The trial court erred in not awarding her damages for her pain and suffering.

(2) She should have been awarded more than nominal damages for the intentional violation of her constitutional rights.

(3) The trial court erred in holding that she could not collect damages based on the Department's refusal to allow her to earn incentive good time.

Regarding her first claim, Manzie points to *Kendall v. Board of Education of Memphis City*, 627 F.2d 1, 6 n.6 (6th Cir. 1980), to support her argument that once a constitutional violation has been shown, the burden shifts to the government to prove that no damages have been suffered. We disagree. *Kendall* had nothing to do with the shifting of

burdens insofar as damages are concerned. Rather, *Kendall* was concerned with the burden of proof placed upon the City when an unconstitutional procedure has been shown in a discharge case. The *Kendall* court ruled that when a deprivation of constitutional rights is established, the state is then given an opportunity to prove that the person seeking reinstatement would have been discharged even if proper procedures had been followed.

A claim for damages, however, involves no shifting of burdens. Damages are recoverable only upon a showing of actual injury. *Morrow v. Igleburger*, 584 F.2d 767, 769 (6th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979); *Freeman v. Franzen*, 695 F.2d 485, 493 (7th Cir. 1982); Familias Unidas v. Briscoe, 619 F.2d 391, 402 (5th Cir. 1980). *See Carey v. Piphus*, 435 U.S. 247 (1978). Here, the court found that Manzie had failed to sustain her burden of showing actual injury.

Manzie argues further that additional damages were warranted because the state knowingly and intentionally violated her constitutional right of access to the courts. In her argument, she seeks to limit the prohibition in *Carey v. Piphus, supra*, against "presumed" constitutional damages to cases involving only procedural due process violations. She contends that presumed damages should be awarded for substantive constitutional violations, even if there is no proof of actual injury. We are unwilling to adopt such a position. In *Morrow v. Igleburger, supra*, a section 1983 action holding city officials liable for keeping the plaintiff incarcerated for an unreasonable time before his arraignment, this court stated that damages are recoverable once a claimant has established a deprivation of his constitutional rights, provided he has demonstrated sufficient evidence to support a finding of actual harm. "The purpose of damage for deprivation of civil rights is to compensate persons for injuries caused by the deprivation." *Morrow* at 769,

citing *Carey v. Piphus*. Several other circuit courts have adopted a similar view. *Freeman v. Frazier, supra; Familias Unidas v. Briscoe, supra; Kincaid v. Rusk*, 670 F.2d 737, 745 (7th Cir. 1982); *Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978). In light of these decisions, we find that the district court did not err in awarding Manzie only nominal damages.

Manzie's third claim raises a more serious problem. She contends the district court improperly applied collateral estoppel, using the earlier finding that Manzie's security classification prevented her from participating in any work release program offered by the Department. The Corrections officials, on the other hand, assert the court not only correctly applies collateral estoppel, but also independently determined that she was disqualified for engaging in the work release program based on her security classification. The pertinent portion of the opinion reads as follows: "I am in agreement with my colleague, James P. Churchill, who reviewed the issue of Manzie's qualification for a camp program in a petition for habeas corpus and am bound by his decision, at least as it applies to the accumulation of good time." Our review of the record shows no evidence upon which the trial court could have independently determined that Manzie was disqualified from participating in the Department's work release program based upon her security classification. Despite this conclusion, Manzie's claim for damages must be denied.

Assuming, arguendo, that Manzie was qualified to participate in the Department's work release program, we find Manzie's claim for lost wages too speculative. She contends that had she been able to participate in the work release program she would have earned good time credit, thereby reducing the length of her sentence. She then asserts that this reduction in her prison term would have allowed her to begin at an earlier date her job as a paralegal

in a Detroit law firm. Because she was denied this opportunity Manzie claims as damages the wages she would have earned had she been able to start work at an earlier date.

We find this testimony too speculative to support an award of damages. Damages are recoverable only where there has been a sufficient showing of actual harm. *Morrow, supra*, 584 F.2d at 769. Here, Manzie asks us to accept her bald assertions that her employment as a paralegal was delayed due to the Department's discriminatory policy. The record below does not establish such an assertion. The record only indicates that Manzie was prevented from obtaining an early release. Manzie offers no evidence to support the conclusion that a position as a paralegal, or any other employment position, awaited her release from prison. Fortunately, Manzie was able to secure employment after release. This fact, however, does not automatically entitle her to an award of damages. Manzie also had to prove the discriminatory policy involved here caused her actual harm. This she failed to do.

Accordingly, the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Helman /s/
Clerk

ISSUED AS MANDATE: DECEMBER 22, 1983
COSTS: NONE

A TRUE COPY
Attest: JOHN P. HEHMAN, Clerk
BY Linda L. Brisson
Deputy Clerk

*This order was prepared by Judge Martin.

(NOT RECOMMENDED FOR FULL-TEXT PUBLICATION)

Filed Dec. 14, 1983
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARMAINE L. CORNISH, Plaintiff GEORGIA D. MANZIE, Plaintiff-Appellant v. PERRY JOHNSON, Director, Michigan Department of Corrections and GLORIA RICHARDSON, Superintendent, Huron Valley Women's Facility, individually and in their official capacities, jointly and severally, Defendants-Appellees	No. 82-1064

ORDER

Before: ENGEL and MARTIN, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by the appellant, the court concludes that the issues raised therein were fully considered upon the original submission of this case.

IT IS THEREFORE ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman /s/
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARMAINE L. CORNISH and GEORGIA D. MANZIE, Plaintiffs, v PERRY JOHNSON, Director, Michigan Department of Corrections and GLORIA RICHARDSON, Superintendent, HURON VALLEY WOMEN'S FACILITY, individually and in their official capacities, Jointly and Severally, Defendants.	Civil Action No. 77-72557

ORDER

At a session of said Court held in the Federal District Court, City of Detroit, MI on July 10, 1984.

PRESENT: HONORABLE JOHN FEIKENS, U.S. District Judge.

This matter having come before the court on Plaintiff Manzie's attorney's motion for an award of attorney fees,

pursuant to 42 U.S.C. §1988, and the Court being fully advised in the premises, and for the reasons set forth below, find that the Plaintiff's attorney is entitled to attorney fees:

1. That Plaintiff is the prevailing party.

2. That Plaintiff's attorney's hourly rate of $125.00 per hour is reasonable.

IT IS FURTHER ORDERED that attorney fees in the amount of $2,500.00 be awarded to RICHARD A. SOBLE.

John Feikens /s/
U.S. District Judge

APPROVED AS TO FORM
Eric J. Eggan /s/
Eric J. Eggan, (P32368)
Assistant Attorney General
(517) 373-3474
Attorneys for Defendants

A TRUE COPY
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY DEPUTY CLERK

FILED
SEPT. 11, 1985
JOHN P. HEHMAN, Clerk

(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARMAINE L. CORNISH and GEORGIA D. MANZIE, Plaintiffs-Appellees, v. PERRY JOHNSON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, AND GLORIA RICHARDSON, SUPERINTENDENT, HURON VALLEY WOMEN'S FACILITY, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, JOINTLY AND SEVERALLY, Defendants-Appellants.	No. 84-1593

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Decided and Filed _____

Before: KRUPANSKY and MILBURN, Circuit Judges; and NEESE[1] Senior (Retired District) Judge

[1] Hon. C. G. Neese, of Nashville, Tennessee, who retired as a district judge of the United States District Court for the Eastern District of Tennessee, sitting by designation and assignment.

PER CURIAM. Defendants Perry Johnson, Director of the Michigan Department of Corrections, and Gloria Richardson, Superintendent of the Huron Valley Women's Facility, appeal the award of attorney's fees to counsel for plaintiff Georgia D. Manzie for services performed in conjunction with Manzie's §1983 cause of action.

Manzie, a former prisoner of the Michigan Department of Corrections, joined Charmaine Cornish in commencing a §1983 *pro se* action on September 21, 1977, wherein declaratory relief and monetary damages were sought for the defendants' alleged failure to provide a constitutionally adequate law library during plaintiffs' incarceration, thus denying plaintiffs' first amendment right of access to the courts. This case was styled *Cornish, et al. v. Johnson, et al*. Manzie's action was subsequently consolidated with a pending class action, *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979).

In its opinion resolving the *Glover* dispute, the district court specifically noted that *Glover* and *Cornish* had been deemed suitable for consolidation because both cases challenged the adequacy of the law library furnished to women at the Detroit House of Corrections ("DeHoCo") and the Huron Valley Women's Facility ("Huron Valley"). *Glover*, 478 F. Supp. at 1076, 1094. The *Glover* opinion further disclosed that Manzie and co-plaintiff Cornish had "appeared pro se on several occasions for the purposes of examining witnesses pertinent to their claim and making their final argument," but that the court had appointed counsel representing plaintiffs in *Glover* to aid Cornish and Manzie "[f]or the limited purpose of preparing and filing a post-trial brief." *Glover*, 478 F. Supp. at 1094.

By applying the standards enunciated by the Supreme Court in *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), the district court in *Glover* concluded

that the law library at Huron Valley, as it existed at the time of trial in 1979, was constitutionally adequate, 478 F. Supp, at 1096, but that female prisoners were also entitled to a paralegal program currently available to all male prisoners. 478 F. Supp. at 1097. Thus, the court determined that defendants had effectively denied plaintiffs' right of access to the courts. *Id.* The court added:

> Having determined the liability of Defendants to Plaintiffs in this matter [of access to the courts at Huron Valley], I must resolve the issue of damages. At an earlier point in these proceedings, I limited plaintiffs' proofs to matters going directly to the issue of liability on the grounds that damages would become relevant only if a finding of liability was made. Plaintiffs, therefore, must now be given an opportunity to prove such damages, if any, as were caused by the state's denial of their constitutional rights, and a hearing for that purpose will be held at a date to be set by the court.[21]

Glover, 478 F. Supp. at 1097-1098.

In footnote 21, the *Glover* court further explained its holding:

> [21]At this hearing, Plantiffs will be permitted to reintroduce their evidence relating to the conditions of the law library at the Detroit House of Corrections insofar as it relates to the denial of their rights at the time [when they were incarcerated] — a matter which I do not specifically address in this opinion. Defendants, of course, will also be permitted to meet the issues raised by these proofs.

After the *Glover* decision was issued, plaintiff Manzie retained present counsel to represent her regarding the remaining issues in her case as outlined above in the

Glover opinion. In hearings on June 5 and 7, 1981, plaintiff, through counsel, offered extensive legal argument in support of the allegation that her constitutional right of access to the courts had been violated because of deficiencies in the DeHoCo and Huron Valley law libraries prior to September, 1977. To support Manzie's claim, several witnesses were called, including James Neuhard, director of the Michigan State Appellate Defender's Office; defendants Richardson and Johnson; and Charles Wolf, assistant state law librarian. In addition, legal arguments were taken as to defendants' claims of Eleventh Amendment, executive and/or qualified immunity.

In a memorandum entitled "Opinion on Damages" issued on December 18, 1981, the district court initially explained that the purpose of the June hearing was "to determine the library resources available to the individual plaintiffs during their incarceration and to assess their damages, if any, from the alleged inadequacy." After an extended discussion of the evidence adduced at the hearing, the court concluded that the law library at DeHoCo, where women felons were housed prior to completion of Huron Valley in August, 1977, was "nonfunctional at DeHoCo and, for all practical purposes, non-existent" and "not in conformity with constitutional standards" during the relevant time periods. The 1981 opinion then devoted five pages to addressing three affirmative defenses to plaintiffs' charges, specifically Eleventh Amendment immunity, executive immunity, and qualified immunity, ultimately holding the defenses unavailable to defendants herein. The remaining sections of the opinion discussed the damages to be awarded plaintiffs, concluding that a nominal award of $1 was appropriate. Manzie appealed the decision, which was affirmed by the Sixth Circuit.

Manzie's attorney, Richard Soble, submitted a fee petition, based on contemporaneously maintained records, for

86.95 hours at $125 an hour, resulting in a total award request of $10,868, plus $287 in costs. Following a hearing on the petition, the court determined that Manzie was the prevailing party, that $125 an hour was a reasonable rate, and that a total award of $2,500 was just. Defendants filed a timely appeal of the fee award, wherein they urged *inter alia*, that Manzie was not a "prevailing party" within the ambit of §1988.

In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983), the U.S. Supreme Court reviewed the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, and concluded that the purpose of §1988 is to ensure effective access to the judicial process for persons with civil rights grievances. 103 S.Ct. at 1937. The Court opined:

> Accordingly, a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

Id. (citations omitted).

The *Hensley* Court also adopted the standard recognized in numerous circuits that an individual should be considered a "prevailing party" for attorney's fees purposes "if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley*, 103 S.Ct. at 1939 *(quoting Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978)). The Sixth Circuit reflected a similar sentiment in *Dover v. Rose*, 709 F.2d 436 (6th Cir. 1983), wherein it opined:

> In order to be a prevailing party for purposes of section 1988, a plaintiff must establish his entitlement to some form of relief on the merits of a substantial claim.

> (citations omitted). The plaintiff must accomplish this by obtaining a favorable final judgment on the merits, or by obtaining relief through a consent judgment or other settlement. (citations omitted). This circuit has also indicated that a plaintiff may qualify as a prevailing party if his lawsuit acts as a "catalyst" which causes the defendant to make significant changes in its past practices, though no direct relief is obtained. (cite omitted).

Dover, 709 F.2d at 439.

Despite the contrary protestations of defendants herein, it is obvious that Manzie meets the "prevailing party" criteria enunciated in *Hensley* and *Dover*. Through the evidence adduced in the June, 1981, hearings, Manzie proved the specific allegations of her §1983 complaint, namely, that the library facilities at DeHoCo and Huron Valley were constitutionally deficient prior to 1977. Thus, Manzie prevailed in the litigation and the purposes of §1988 were achieved by her vindication of the important constitutional entitlement of access to the courts.

Defendants further suggested, however, that even if Manzie prevailed, she did so during the *Glover* litigation, wherein she appeared *pro se*, rather as a result of the 1981 hearings for which Manzie retained counsel, which proceedings defendants' characterize as the "post-liability" phase of the litigation. Thus defendants urged, an award of attorney's fees in the instant case is unwarranted. *See e.g., Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983) (§1988 should not be used to provide windfall to opportunistic counsel), *Wheatley v. Ford*, 679 F.2d 1037, 1040 (2nd Cir. 1982) (same).

Defendants argument in this respect completely ignores the unequivocal language found in footnote 21 of the

Glover opinion, 478 F. Supp. at 1098, n. 21, wherein the trial court expressly stated that the issue of liability stemming from the deficiencies of the DeHoCo law library was left for resolution during subsequent proceedings. It was not until the trial court considered the evidence adduced by Manzie's counsel during the June, 1981, hearings that it determined that Manzie's rights had in fact been violated. Thus, it appears beyond peradventure that Manzie's counsel played a critical role in vindicating her constitutional rights, therefore entitling him to remuneration pursuant to §1988.

Defendants further challenged the amount of attorney's fees awarded to Manzie's counsel. As aforementioned, counsel submitted a fee petition seeking compensation for 86.95 hours at $125 per hour, with the district court ultimately awarding approximately 25% of the amount requested.

Defendants argued that the amount of the award was excessive because "[p]laintiff's success on the question of damages was not simply limited, it was virtually nonexistant." In advancing this contention, defendants focus on the damage amount awarded the plaintiff, i.e., $1, as the measuring stick of her success in the litigation.[2] As observed previously, however, the actual damage award was entirely secondary if not irrelevant to whether or not plaintiff was the "prevailing" party. Rather, the appropriate question was whether plaintiff had in fact vindicated her constitutional rights. As the district court's order of

[2]

Defendants concede that an award limited to nominal damages does not by itself negate entitlement to attorney's fees pursuant to §1988. *See McCann v. Coughlin*, 698 F.2d 112 (2nd Cir. 1983); *Dean v. Civiletti*, 670 F.2d 99 (8th Cir. 1982); *Johnson v. Snyder*, 639 F.2d 316 (6th Cir. 1981) (per curiam); *Perez v. Univ. of Puerto Rico*, 600 F.2d 1 (1st Cir. 1979).

December 17, 1981, unequivocally states that plaintiff had prevailed on her claim that defendants had intentionally violated her right of access to the courts, an award of attorney's fee was proper pursuant to the *Hensley* analysis. The fact that plaintiff's counsel only received 25% of the requested amount, despite documentation by contemporaneous records and lack of objection by defendants as to the total number of hours and hourly rate, makes affirmance all the more appropriate.

In view of the foregoing, the decision of the district court is AFFIRMED.

ISSUED AS MANDATE: October 3, 1985
COSTS: APPELLEE TO RECOVER
Printing costs . . . $52.50

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By Deputy Clerk

Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1341

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

PERRY JOHNSON, Director
Michigan Department of Corrections,
and GLORIA RICHARDSON, Superintendent,
Huron Valley Women's Facility,

Petitioners,

v

GEORGIA D. MANZIE,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

RICHARD A. SOBLE
3000 Cadillac Tower
Detroit, MI 48226-3889

(313) 965-0050

Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

I.

DOES THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDE A RE-DETERMINATION OF RESPONDENT'S STATUS AS A PREVAILING PARTY WHEN SUCH STATUS WAS DETERMINED WITHOUT ANY OBJECTION OF PETITIONERS AT AN EARLIER STAGE IN THE LAWSUIT?

II.

DID THE TRIAL COURT AND THE COURT OF APPEALS HOLDING THAT RESPONDENT'S SUCCESS IN ESTABLISHING PETITIONERS' VIOLATION OF HER CONSTITUTIONAL RIGHTS ENTITLE HER TO ATTORNEY FEES AS A PREVAILING PARTY UNDER 42 U.S.C. §1988?

III.

AFTER FINDING RESPONDENT TO BE THE PREVAILING PARTY, DID THE DISTRICT COURT PROPERLY EXERCISE ITS DISCRETION IN REDUCING RESPONDENT'S FEE BY 77% FROM THE AMOUNT REQUESTED PURSUANT TO THE HENSLEY v ECKERHART REQUIREMENT THAT THE FEE AWARD TAKE INTO ACCOUNT THE DEGREE OF SUCCESS?

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SUMMARY OF ARGMENT

I.

The doctrine of collateral estoppel bars Petitioners from asserting that Respondent is not a prevailing party. In an earlier fee award made to another attorney in this lawsuit, the District Court specifically found that Respondent was the prevailing party. Petitioners made no objection to this finding.

The present fee petition involves the same parties, and controlling law and facts as the earlier fee award. Petitioners had a full and fair opportunity to litigate the issue at the earlier fee petition, yet they chose not to do so do. The doctrine of collateral estoppel now bars Petitioners from challenging Respondent's prevailing status.

II.

There is ample support in the record for the trial court's finding that Respondent was a prevailing party for §1988 purposes. Under the test in Hensley v Eckerhart, 461 US 424 (1983), a party needs only to succeed on any significant issue or to achieve some of the benefit sought in order to be a prevailing party for §1988 purposes.

Respondent did succeed in establishing: that her constitutional rights had been violated, that the Petitioner had knowingly and willfully violated her constitutional right of access to the courts; that Petitioners' claim of eleventh amendment immunity, executive immunity and qualified immunity did not shield them from liability; that Petitioners' violation of Respondent's constitutional rights entitled her to nominal damages.

Petitioners' assertion that a party who receives only nominal damages is not a "prevailing party" contravenes the law and policy of §1988, It is uniformly recognized that an award of nominal damages confers prevailing party status upon the recipient. Consideration of the limited nature of such an award vis-a-vis attorney fee awards properly goes to the extent of the Respondent's success, and hence the amount of the attorney fee - rather than to the prevailing party issue.

III.

Section 1988 specifically vests the district court with discretion in awarding attorney fees. This Court has said in Hensley that in exercising its discretion to determine the amount of an attorney fee award, the district court should consider, inter alia, the extent of the party's success in the litigation.

In this case, the district court expressly awarded Respondent a fee based upon its view of the extent of Respondent's success. In recognition of the fact that the award of nominal damages constituted only a limited success for Respondent, the district court awarded her less then twenty-five percent of the requested attorney fee. Petitioner has referred to nothing which would indicate that the district court abused its discretion in making this fee award. Since there is no indication of abuse of discretion, this Court should decline to review this case.

STATEMENT OF THE CASE

This matter has been conducted in two separate proceedings. Respondent's pro se complaint was intitally consolidated with Glover v Johnson, 478 F Supp 1075 (E D Mich 1979), a class action challenging the conditions of the confinement of female prison inmates at the Detroit House of Corrections (DeHoCo) and the Huron Valley Womens Facility.

The court in Glover held that the educational and vocational programs in the women's facilities were substantially less adequate than those offered in Michigan men's facilities ,that women in these facilities had been denied access and to paralegal education programs which were offered to men, and that the state was prohibited from using a county jail as an overflow facility. Glover, supra, at pp 1102-;1103.

After the Glover proceeding was terminated, a separate hearing was held to determine the issues regarding the adequacy of the law libraries at DeHoCo and at Huron Valley prior to September 29, 1977. The issues in this second proceeding were entirely separate from those determined in Glover. Judge Feikens specifically noted this in the Glover opinion.

> At this hearing, Plaintiffs will be permitted to reintroduce their evidence relating to the conditions of the law library at the Detroit House of Corrections insofar as it related to the denial of their rights at the time - a matter which I specifically do not address in

> this opinion. Defendants, of course, will also be able to meet the issues raised by these proofs. (emphasis added)
>
> Glover, supra at p 1098 nt 21

Respondent retained present counsel to represent her in this second proceeding. In addition, the District Court appointed attorney Charlene Snow to aid Respondent in preparation of her post-trial brief.

In the hearing on June 5 and 7, 1981, Respondent offered extensive evidence in support of her allegation that her constitutional right of access to the courts had been violated due to the deficiencies in the law libraries at DeHoCo and at Huron Valley. Respondent also presented substantial legal argument on the issue of Petitioners' assertions of immunity. The extent of the dispute regarding Petitioners' culpability in violating Respondent's right of access to the courts is highlighted by the fact that twelve of the fifteen pages of Judge Feikens' Opinion

on Damages, dated December 16, 1981, are devoted to establishing Petitioner's liability.

Petitioners consistently held the position throughout the June, 1981 proceeding that the law libraries for female prisoners had been adequate, that Respondent's right of access to the courts had not been violated and that Respondent could maintain no legal claim against Petitioners for damages. The Relief section of Petitioners' Brief in Support of Affirmative Defenses, filed in Manzie v Johnson, USDC-ES No. 77-72557 dated June 16, 1981, states: "Wherefore, for all of the foregoing reasons, Defendants respectfully request this Honorable Court to dismiss with prejudice Plaintiffs' action for damages." (emphasis added).

The District Court ultimately held "that Respondent's constitutional right of access to the courts was knowingly and intentionally violated by both of the individual Defendants in this case." Manzie v Johnson USDC-ES No. 77-72557, Opinion On Damages, December 16,

1981, reprinted at p 21a of Petition for Writ of Certiorari. The Court also held that Petitioners were not shielded from liability due to government immunity, Manzie at pp 11a-17a and that the Petitioners were liable for any damages caused by their violations of Respondent's rights. Manzie, Opinion at p17a

The District Court awarded Respondent a nominal damage award in recognition of the fact that Respondent "suffered humiliation and frustration resulting resulting from the mere denial of rights that she had come to expect, particuarly the right of access to the judicial system." Manzie, Petition at p 23a These determinations were upheld upon appeal Manzie v Johnson, Docket No. 82-1064, November, 1983.

Subsequent to the December 15, 1981 Opinion in Manzie, the district court heard attorney Charlene Snow's motion for attorney fees. Manzie v Johnson, USDC-ES No. 77-72557, Opinion on Motion for Attorney Fees, February 5, 1982. The court awarded attorney Snow the entire amount that she had requested,

$3,482.75, noting that the "award of attorney fees [was] proper in this case since [Respondent] has prevailed on [her] claim.... No objection to this Finding was made by Petitioners". Petition at p 27a-28a.

Respondent subsequently petitioned the District Court for attorney fees for attorney Soble pursuant to 42 USC §1988. Respondent sought $10,868.78 in fees. Judge Feikens determined that Respondent was likewise entitled to fees under §1988 as a prevailing party, but reduced Respondent's fee award to $2,500.00 utilizing the "results obtained" analysis put forth in Hensley v Eckerhart the District Court award was affirmed by the Sixth Circuit on September 11, 1985, Manzie v Johnson, No. 84-1593 September 11, 1985. Petitioners subsequently petitioned this Court for Writ of Certiorari.

I.

PETITIONERS ASSERTION THAT RESPONDENT IS NOT A PREVAILING PARTY FOR §1988 PURPOSES IS BARRED BY COLLATERIAL ESTOPPEL.

Under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue" in the same or a different action involving the same parties. Allen v McCurry, 449 US 90,94 (1980).

In order for collateral estoppel to act as a bar to the relitigation of an issue, it must first be established that: 1)that the parties involved in the first litigation of the issue are also involved in the relitigation attempt, 2) the issue sought to be relitigated is identical to the previously litigated issue, and 3)there has been no change in controlling facts or legal principles. United States v Stauffer Chemical Co, 464 US 165, 104 S Ct 575, 578 (1984).

In addition "one general limitation the Court has repeatedly recognized is that the

concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a'full and fair opportunity ' to litigate that issue in the earlier case." Allen, 449 US at 95.

The case at bar presents a paradigm collateral estoppel situation. As noted in the Statement of the case, prior to the present attorney fee petition, the District Court awarded attorney fees to Charlene Snow, Respondent's counsel appointed by the court. In awarding a fee for attorney Snow, Judge Feikens specifically determined that Respondent was the prevailing party.

The Opinion stated:

> An award of attorney fees is proper in this case since plaintiffs have prevailed on their claim.
>
> . . . .
>
> No objection is made by opposing counsel.
>
> Petition at 27a-28a

Petitioners are now estopped by this prior determination that Repondent is not a

prevailing party .There is no dispute that all parties to this Petition particpated in the award of attorney fees to attorney Snow; it was and is all part of the same lawsuit. Similarly, the issue for which Petitioners seek review in this Court is precisely the same issue already determined in Respondent's favor by the trial court - that Respondent prevailed on her claim. Likewise, since this is all part of the single lawsuit,there has been no change in the controlling facts of this lawsuit since the award of fees to attorney Snow.

Additionally, there has been no change in the controlling law since Respondent was first found to be a prevailing party. Although this Court decided in Hensley v Eckerhart, 461 US 424 (1983), after the fee award to attorney Snow, Hensley did not represent any change in the law regarding the prevailing party issue; rather Hensley was significant for announcing the "extent of success" analysis in determining the amount of a fee award. The test for prevailing party status set forth in Hensley

was adopted from a 1978 court of appeals case, and was formulated by this Court as being a statement of the existing law regarding this issue. The rule in the Sixth Circuit as set forth in Northcross v Board of Education, 611 F2d 624 (6th Cir 1979), is functionally identical to that set forth in Hensley.

Finally, Petitioners had a full and fair opportunity to raise this issue at the hearing for the award of fees to Snow. Judge Feikens specifically noted, however, that Petitioners made no objection to the finding that Repondent was a prevailing party. Neither did Petitioners seek to appeal or in any other way challenge Respondent's prevailing party status for purposes of the fee award for attorney Snow.

It would be anomalous if Petitioners could concede that Respondent is a prevailing party for the purpose of a fee award to one attorney and subsequently assert that Respondent - the same party in the same action- was not a prevailing party for the purpose of a fee award

to the other attorney in the lawsuit.Simple logic does not permit two conflicting determinations of a single issue between the same parties in one lawsuit. This Court should apply the doctrine of collateral estoppel to hold that Respondent is the prevailing party in this lawsuit, thus entitling her to an award of attorney fees under §1988.

II.

THE TRIAL COURT AND COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT'S SUCCESS IN ESTABLISHING PETITIONER'S VIOLATION OF HER CONSTITUTIONAL RIGHTS ENTITLED HER TO ATTORNEY FEES AS A PREVAILING PARTY UNDER 42 USC §1988s4

There is no dispute that the applicable test for determining whether a party has "prevailed" under 42 USC §1988 for attorney fee purposes in that set forth by the Court in Hensley,v Echerkart, 461 US 424 433 (1983)

> A typical formulation is that Plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in this litigation which achieves some of the benefit the parties sought in bringing the suit.

This test emphasizes the fact that a party need not succeed on all issues litigated or achieve all of the benefits desired in order to be a prevailing party for attorney fee purposes. This formultion is consistent with the intent of the legislative in enacting §1988.

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate [such rights].
>
> In several hearings held over a period of years, the [Senate Judiciary] Committee has found that fee awards are essential if the federal statutes to which S.2278 applies are to be fully enforced. We find that the effect of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such complaince.
>
> S. Rep. (Judiciary reprinted in, U.S. Code Cong. & Ad News 5908, 5910-5913

On February 5, 1982,, the District Court determined that Respondent was the prevailing

party. In an opinion on a Motion for an Award of Attorney Fees to Charlene Snow, Respondent's counsel appointed by the court, a determination of prevailing party status was made:

> A hearing was held on June 5, 1981, to determine the library resources available to the individual plaintiffs during their incarceration and to assess their damages, if any, from the alleged inadequacies. In an opinion issued on December 17, 1981, I found that the law library provided to women prisoners at the Detroit House of Corrections was not in conformity with constitutional standards.
>
> An award of attorney fees is proper in this case since plaintiffs have prevailed on their claim.
>
> No objection is made by opposing counsel.

At the June, 1981 hearing, Respondent addressed three issues: 1)that the law libraries at DeHoCo and at Huron Valley prior to September 29, 1977 were in fact inadequate in violation of Respondent's constitutional right of access to the courts, 2) that

Petitioners were not immune from liability for this constitutional violation under any of the three immunity theories advanced by them, and 3) that the constitutional violations were a cause of Respondent's damages.

The trial court's December, 1981 opinion on damages most accurately reflects all of the issues which were resolved in Respondent's favor at the June, 1981 hearing. It is important to read the trial court's opinion in its entirety. A complete reading of the opinion will reveal the full extent of the disputed issues that were resolved in Respondent's favor at the June, 1981 hearings. Both from an evidentiary and a legal standpoint, the Petitioners strongly opposed Respondents' attempt to establish the constitutional violation and the resultant liability for damages. Petitioners did not stipulate to a single fact nor did they fail to raise any defense available that would have exonerated their conduct.

At the outset of the opinion, the trial court noted the purpose of the June hearing:

> A hearing was held on June 5, 1981, to determine the library resources available to the individual plaintiffs during their incarcertation and to assess their damages, if any, from the alleged inadequacies.
>
> Petition at p 6a
> (emphasis added)

Thus, contrary to the Petitioners' assertion that the only issue at the June, 1981 hearing was the amount of Respondent's compensable injury, the trial court specifically noted that Respondent had to establish the adequacy of the law library, and the resultant constitution violation, before damages could be determined.

In order to establish the constitutional violation, Plaintiffs offered the testimony of several witnesses. James Neuhard, Director for the Michigan State Appellate Defender's Office, testified that he had personally visited DeHoCo and found it to competely lack any sort of law

library. Perry Johnson, a Defendant in this case, admitted that although he had developed a checklist for the mininum requirements of an adequate law library under the law in 1973, he knew that DeHoCo did not meet those requirements. Charles Wolf, Assistant State Law Librarian, stated that he had personally observed unopened cartons of law books at both DeHoCo and in 1976 at Huron Valley; Mr. Wolf's observations at Huron Valley were confirmed by the testimony of Gloria Richardson, Superintendent of Huron Valley.

Only after Respondent had presented her evidence on this issue did the trial court make its finding that the law library had been in fact in inadequate. The trial court specifically noted that this finding was based on evidence adduced at the June, 1981 hearing when it stated:

> I find that the law library was inadequate as it existed at DeHoCo through the period of the move to Huron Valley. The testimony at the hearing clearly demonstrates that Johnson knew

> of the need to provide adequate law library facilities to prisoners.
>
> . . .
>
> I also find that the law library provided to women prisoners between December, 1975 and September 29, 1977, was not in conformity with the constitutional standards articulated beginning with Gilmore . . . This is particularly intolerable in light of the admission that law libraries were provided to male prisoners . . . and in view of the checklist generated internally by the department in 1973.
>
> Petition at p10A-11A

Similarly, Respondent offered substantial legal argument at the hearing to defeat Petitioners' assertions of immunity from liability. The court's opinion notes that Petitioners claimed "three affirmative defenses to [Respondent's] charges: Eleventh Amendment immunity, executive immunity and qualified immunity." Petition at p 12a.

With regard to Eleventh Amendment immunity, Judge Feikens noted that it was "the State's

position that there [was] no evidence that its officials, namely Johnson and Richardson, grossly abused the lawful powers of their office . . Petition at p 13. " Again, as this passage indicates, the resolution of the Eleventh Amentment issue in Respondent's favor required Respondent to offer evidence at the hearing.

Respondent also had to offer evidence to prevail on her arguments on the executive and qualified immunity issues. With respect to the executive immunity issue, the trial court noted that "the degree of immunity is limited if the official knew or should have known that his actions would violate the constitutional rights of the individual or if the action was malicious in intent." Petition at p16a. Thus, Respondent had to offer proofs as to the issues of knowledge and of malicious intent.

Knowledge was also at issue in defeating Petititioners' qualified immunity assertion. The court's opinion clearly indicated that its determination in Respondent's favor was based

on evidence adduced at trial.

> [If] the right allegedly infringed by Defendants was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm, the good faith immunity defense would not be applicable.
>
> [citation omitted]

I find that the conduct of the defendants in this case cannot withstand the test for good faith immunity.

Petition at p 16a

The opinion then reviewed the evidence adduced at trial and stated:

> Based on these facts, I must conclude that the conduct of the Department officers, acting in their individual capacity, was undertaken with full knowledge of the right of the women prisoners to access to a law library and in willful violation thereof.
>
> Petition at p 17a.

The trial court ultimately held that the

law libraries at the two correctional institutions prior to September 29, 1977, had been "for all practical purposes, nonexistent." Petition at p.11a The court further found that beause of the ineadequacy of the law libraries, constitutional right of access to the courts was knowingly and intentionally violated by both the individual defendants in this case." Petition at p21a

It was only after the court reviewed all of the evidence and found Peitioners liable that it addressed the issue of damages.

> Having determined that there is liability on the part of the defendants. and finding that there are no applicable defenses. . . I must now determine the issue of damges.
>
> Petition at p 17a

In deciding to award nominal damges to Respondent, Judge Feikens quoted from another district court opinion, noting that

[In] most cases when a public denied rights that the citizens felt were secure under our Constitution, the result is hurt feelings, outrage and embarrassment or humiliation and

nominal damages may be awarded for these natural consequences of lawless action by state officials. Petition at p 22a

The court further noted that nominal damages are specifically appropriate in this case because Respondents "were denied their constitutional rights" Petition at p 23a and they "suffered humiliation and frustration resulting from mere denial of rights they had come to expect, particularly the right of access to the judical system." Id.

Petitioners now contend that Respondent was not a prevailing party for the purposes of §1988 attorney fees. This contention totally ignores Respondent's success on the substantial factual and legal issues involved in establishing Petitioners' liability. Respondent agrees that certain other constitutional rights were vindicated in Glover v Johnson. However, the issues determined in Respondent's favor in Manzie, as noted above, had been specifically reserved by the District

Court for determination at the June, 1981 hearings.

Given the Respondents' clear status as a prevailing party in the June, 1981 Manzie hearing, there is no reason to grant certiorari to review this case as it presently stands. There is no dispute that the Sixth Circuit Court of Appeals based its affirmance of the District Court's award of fees on the test set forth by this court in Hensley v Eckerhart. There is also no dispute that the Hensley test is the controling rule of law in this area.

Furthermore, it is uniformly recognized among the circuits that in §1988 cases an award of nominal damages entitles a party to attorney fees as a prevailing party. See e g. Dean v Civiletti, 670 F 2d 99 (8th Cir 1982); Milne v Cavvoto, 653 F 2d 80 (2d Cir 1981); Johnson v Snyder, 639 F 2d 316 (6th Cir 1981); Skoda v Fontani, 646 F 2d 1193 (7th Cir 1981; Burt v Abel 585 F 2d 613 (4th Cir 1978).

This rule evinces a recognition of the important role of the trial court's statutorily

vested discretion in §1988 cases. The failure to obtain compensatory damages does not, in and of itself, strip Respondent of prevailing party status; it is, rather, a factor to be considered by the trial court in awarding an attorney fee that is reflective of the degree of success, as required by this Court in Hensley. As is more fully demonstrated in Part II, below, the fee award in this case reflects the District Court's judgment on the degree of Respondent's success.

The rule that the amount of a damage award is more properly reflected in the determination of the degree of success than in the prevailing party determination is necessary to effect the purpose of §1988. As noted by the second circuit:

> The legislative history of §1988 indicates a strong Congressional intent to encourage private enforcement of the nation's civil rights statutes and to award attorney's fees to prevailing parties.
>
> If private citizens are to be able to assert their civil

rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what if costs them to vindicate these rights in court . . If the cost of private enforcement becomes too great there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 6 (1976) U.S. Code Cong. & Ad. News 5908, 5910, 5913.

The policy underlying the statute is to encourage litigants to assume the role of a private Attorney General. This policy may be served by granting a feee request even where a plaintiff is unable to prove actual damages resulting from his constitutional deprivation. The Supreme Court's decision in Carey v Phiphus, supra, makes clear that party may prove a violation of his due process rights and still be unable to show the requisite causation required for an award of compensatory damages. The fact that a plaintiff is awarded only nominal damages does, not

indicate that he has been unsuccessful or has not prevailed on his claim.

McCann v Coughlin, (Cir 1983)

III.

THE DISTRICT COURT PROPERLY CONSIDERED THE EXTENT OF RESPONDENT'S SUCCESS, AS REQUIRED BY HENSLEY v ECKERHART IN REDUCING RESPONDENT'S FEE AWARD BY APPROXIMNATELY 77% FROM THE AMOUNT REQUESTED.

Petitioners acknowledge that the Hensley rule controls this case. Under this rule, the normal fee award is the product of the hours that counsel spend on the case and a reasonable hourly rate. Hensley, , 461 US at 433. Pursuant to this formula, counsel for Respondent submitted a fee petition for 86.95 hours, based on contemporaneously maintained records, at $125.00 per hour, resulting in a total requested fee award of $10,868.78, plus $287.00 in costs. Respondent did appeal the nominal damage award to the Sixth Circuit;however, no fee request was submitted

for the hours spent on the appeal at it was unsuccessful.

There was no objection to the number of hours spent on this litigation, nor on the hourly rate requested. The only objection raised to Plaintiff's fee was raised was that Plaintiff should not receive the full fee requested pursuant to the nalysis in Hensley.

Upon hearing Plaintiff's fee petition, Judge Feikens reaffirmed "that Miss Manzie was the prevailing party . . ." and "that as the prevailing party she is entitled to an award of attorney fees . . . "transcript of June 5, 1984, Manzie v Johnson, USDC-ES No. 77 72557, at p 23 The court then went on, applying the Hensley analysis, to determine what it felt to be a reasonable fee amount based on the degree of Miss Manzie's success: "And it seems to me that what would be reasonable under all of the circumstances is to award you an attorney fee of [sic] $2,500.00. and costs in the amount of $278.00." Transcript of June 5, 1984 hearing at p 24.

The $2,500.00 fee ultimately awarded by the district court represented a 77% reduction from the amount originally requested by Respondent. Judge Feikens reduced the fee award to reflect the extent of Respondent's success in the case and to comport with proper billing judgment.

Respondent is unable to determine the basis upon which Petitioners now assert that this fee award is excessive. Respondent was the prevailing party in the case, thus entitling her to a fee award. A verdict of nominal damages, as demonstrated above, supports an award of attorney fees. Judge Feiken's very substantial reduction in Respondent's fee represents an exercise of his statutory discretion under §1988; Petitioners have shown nothing in the record which would indicate an abuse of such discretion.

The concerns set forth in City of Riverside v Rivera, 54 USLW 3143 (August 10, 1985), support the fee award in this case. Justice Rehnquist, referring to City of

McKeesport v Cunningham, supports the view that a fee award should be at least partially proportional to the amount of monetary relief awarded in the underlying case, and that the award should comport with normal billing pratices in regular fee-generating cases. In the present case, Judge Feikens specifically considered the a ount of Respondent's monetary relief and proper billing procedures in determing the amount of the fee award. On pages 23-24 of the Transcript of the 1984 attorney fee hearing, the court stated "And to me, Mr. Soble, it seems to me that there has to be a relationship between the amount billed and the result obtained ." Additionally, the court noted that billing judgment should be a factor in determining the amount of a fee award. On page 19 of the transcript, the court stated: "and you know -- I know and and you know becuase billing is, I am sure, one of the difficult things that you encounter in your office. --I know when I was in the practice of

law , that was always a hard thing to do, was to determine what the bill should be in given stiuations."

The approach taken by the District Court is entirely consistent with the "extent of success" analysis in Hensley" and the concerns expressed by Justice Rehnquist in Rivera. The district court thus fully considered all factors that are a a part of the fee award determination. Since Petitioners have shown nothing which would indicate an abuse of discretion by the district court in applying these factors, this Court should decline to review this matter.

CONCLUSION

For all of the foregoing reasons, this Court should decline to issue a Writ of Certiorari to the Sixth Circuit in this matter.

Respectfully submitted,

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